



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Herbert Bauer GmbH & Co.

**File:** B-225500.3

**Date:** August 10, 1987

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### **DIGEST**

1. Contracting officer's nonresponsibility determination was reasonable where based on an on-site preaward survey of protester's facility which was conducted in conjunction with the award of a contract for a similar product by a different agency, and on protester's unsatisfactory past performance record with respect to production and delivery.
2. Fact that termination for default under other contract has been appealed to the Armed Services Board of Contract Appeals does not eliminate such a termination as evidence of protester's nonresponsibility.
3. Protester has not established bad faith on the part of the contracting activity where the activity indicated an intention to conduct an on-site preaward survey and such a survey of the protester's plant facility was conducted with respect to a different procurement for similar equipment. The decision of whether or not to conduct such a preaward survey is discretionary with the contracting activity and the nature and extent to which such a survey is to be used is a matter of judgment for the contracting officer.

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### **DECISION**

Herbert Bauer GmbH & Co. protests the rejection of its offer under request for proposals (RFP) No. DAAA09-86-R-1241, issued by the Department of the Army for the procurement of 24,400 bayonets. Bauer alleges that the Army acted improperly in determining it to be nonresponsive. We deny the protest.

Bauer was the low offeror under the RFP. The Army conducted a short-form desk survey based on current information in its files which resulted in a recommendation that no award be made to Bauer because of its unsatisfactory technical,

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production, quality assurance and financial capabilities. In addition, Bauer had failed two first article tests under a different procurement for the same type of bayonets. Bauer filed a protest with our Office alleging that it had not actually failed the first article tests and that a proper preaward survey had not been performed. We dismissed that protest as academic on December 15, 1986, in response to an Army submission which stated that no award would be made until the first article test problem had been resolved under the other contract, and that the contracting activity would request the U.S. Army Contracting Agency, Europe (USACA), to perform a full on-site preaward survey of Bauer's facilities.

Subsequently, Bauer failed another first article test under its other bayonet contract, which resulted in the issuance of a termination for default. Bauer filed an appeal of this termination which is pending before the Armed Services Board of Contract Appeals (ASBCA). In response to the procuring activity's request for an on-site audit of Bauer's facility, USACA advised that it had just conducted a full on-site preaward survey of Bauer's production facility on January 12, 1987, for a Marine Corps procurement of swords and scabbards; a no award recommendation had resulted because of unsatisfactory findings with respect to Bauer's technical, production and quality assurance capabilities. Further, this on-site survey indicated that numerous quality deficiency reports (QDR) (which had contributed to the earlier no award recommendation under the short-form desk survey) were the result of Bauer's systematic failure to understand the quality assurance system. USACA concluded that these findings were equally applicable to Bauer's bayonet production and, on April 14, a negative preaward survey recommendation was issued based in part on the on-site survey. On May 1, the contracting officer determined that Bauer was nonresponsible because of technical, quality assurance, and past performance deficiencies, based on the April 14 USACA recommendation and also on the fact that Bauer had been terminated for default for failure to pass the first article test for bayonets under the other contract, and that Bauer had an extensive history of QDR's under recent contracts for products similar to the bayonets.

The regulations provide that contracts shall be awarded to responsible contractors only, and list several standards that a prospective contractor must meet. Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 9.103 and 9.104-1 (1986). Those standards include a satisfactory performance record, a satisfactory record of integrity and business ethics, and the necessary quality assurance measures. FAR, 48 C.F.R. § 9.104-1. The regulations place the burden on a prospective contractor to affirmatively demonstrate its

responsibility, FAR, 48 C.F.R. § 9.103(c), and dictate that in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. FAR, 48 C.F.R. § 9.103(b). Concerning past performance, the regulations provide that a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. FAR, 48 C.F.R. § 9.104-3(c).

The determination of a prospective contractor's responsibility is the duty of the contracting officer who is vested with a wide degree of discretion and business judgment. While the determination should be based on fact and reached in good faith, the ultimate decision should be left to the discretion of the contracting agency because it must bear the brunt of any difficulties experienced during the performance of the contract. Firm Reis GmbH, B-224544; B-224546, Jan. 20, 1987, 87-1 C.P.D. ¶ 72. The contracting officer also has broad discretion as to whether or not a preaward survey should be conducted and, if conducted, the degree of reliance to be placed on the results of the survey. Id. Because of the broad discretion of the contracting officer in these matters, our Office will not question a nonresponsibility determination unless the protester can demonstrate bad faith on the part of contracting officials, or that the determination lacks any reasonable basis. Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 C.P.D. ¶ 235.

With respect to the appealed default termination, we have specifically held that while it does not necessarily require rejection of a firm as nonresponsible, such a termination is a proper matter for consideration in determining a contractor's responsibility, despite the pending appeal with the ASBCA. S.A.F.E. Export Corp., B-209491; B-209492, Aug. 2, 1983, 83-2 C.P.D. ¶ 153. Accordingly, the default was properly considered by the contracting officer. In view of the default in conjunction with the negative preaward survey recommendation and Bauer's record of QDR's on recent contracts, the contracting officer had a reasonable basis for the nonresponsibility determination.

Bauer asserts that the contracting officer's conduct evidences bad faith because of the failure to conduct the promised on-site audit specific to bayonet production. A protester alleging bad faith on the part of government

officials bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with specific and malicious intent to injure the protester. The Aeronetics Division of AAR Brooks & Perkins, B-222516; B-222791, Aug. 5, 1986, 86-2 C.P.D. ¶ 151.

Here, the Army contends that it did, in fact, provide Bauer with the on-site preaward survey which it had indicated that it would conduct. We agree, since an on-site survey of Bauer's production facilities was conducted by USACA subsequent to December 15, 1986, and a contracting officer is entitled to rely on such a survey for different equipment under a different procurement as a ground for a nonresponsibility determination. S.A.F.E. Export Corp., B-209491; B-209492, supra. Accordingly, such reliance does not constitute bad faith on the part of the contracting officer.

The protest is denied.

*for* *Seymour E. Friedman*  
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General Counsel